

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ERICA A. LUNDERVILLE,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

15 Defendant.
16

CASE NO. **C08-5382RBL**

REPORT AND
RECOMMENDATION

Noted for January 23, 2009

17 This matter, a complaint to review the Social Security Administrations' decision to deny an
18 application for benefits, has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. §
19 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W.
20 v. Weber, 423 U.S. 261 (1976). This matter has been briefed, and after reviewing the record, the
21 undersigned recommends that the Court remand the matter to the administrative decision for further
22 consideration.

23 INTRODUCTION

24 This case involves an application for Disability Insurance Benefits that was protectively filed on
25 July 6, 2005 (Tr. 66-68). Mrs. Lunderville originally alleged disability beginning July 15, 2004, the date
26 she stopped working due to a spinal cord tumor (Tr. 70-71). Mrs. Lunderville's application was denied
27 initially and on reconsideration (Tr. 56-58, 52-53). She requested a hearing (Tr. 51). She was able to
28 return to full-time competitive work on February 14, 2007, therefore, prior to the hearing, she amended

1 her application to request a closed period of disability and benefits for the period from July 14, 2004 to
2 August 15, 2006 (Tr. 106). A hearing was held on September 25, 2007 (Tr. 341-70). On December 4,
3 2007, the ALJ issued a decision with the following findings:

- 4 1. The claimant meets the insured status requirements of the Social Security
5 Act through December 31, 2009 (Tr. 22).
- 6 2. The claimant has not engaged in substantial gainful activity since July 15,
7 2004, the alleged onset date (Tr. 22).
- 8 3. The claimant has the following severe impairments: status post C2 through
9 T1 laminectomy and resection of an ependymoma with C4 spinal cord
10 injury (Tr. 23).
- 11 4. The claimant does not have an impairment or combination of impairments
12 that meets or medically equals one of the listed impairments (Tr. 23).
- 13 5. After careful consideration of the entire record, the undersigned finds that
14 the claimant has the residual functional capacity to perform sedentary work
15 with a restriction from constant keyboarding (Tr. 26).
- 16 6. The claimant is unable to perform any past relevant work (Tr. 27).
- 17 7. The claimant was born April 14, 1975 and was 29 years old, which is
18 defined as a younger individual age 18-44, on the disability onset date (Tr.
19 27).
- 20 8. The claimant has at least a high school education and is able to
21 communicate in English (Tr. 28).
- 22 9. Transferability of job skills is not material to the determination of disability
because using the Medical Vocational Rules as a framework supports a
23 finding that the claimant is "not disabled" whether or not the claimant has
24 transferable job skills (Tr. 28).
- 25 10. Considering the claimant's age, education, work experience and residual
26 functional capacity, there are jobs that exist in significant numbers in the
27 national economy that the claimant can perform (Tr. 28).
- 28 11. The claimant has not been under a disability, as defined in the Social
Security Act, from July 15, 2004 through the date of this decision (Tr. 28).

23 Mrs. Lunderville requested review of the ALJ's decision and on April 14, 2008, the Appeals
24 Council denied review (Tr. 7-10). The denial of review made the ALJ's decision the final
25 decision of the Commissioner.

26 Plaintiff's Complaint was filed with the Court on June 13, 2008. She specifically argues: (A) the
27 ALJ erred when he failed to properly consider the July 14, 2005 opinion of Jerry Sullivan, M.D. (Tr.
28 218); and (B) the ALJ failed to comply with Social Security Ruling 96-8p, when he determined that Mrs.

1 Lunderville's only non-exertional limitation was a limitation from constant keyboarding. Plaintiff asks
2 that the court remand this case for further proceedings so that the ALJ may assign the appropriate weight
3 to Dr. Sullivan's opinion and so that the ALJ can consider whether Mrs. Lunderville has additional
4 limitations in the use of her hands.

5 DISCUSSION

6 This Court must uphold the determination that plaintiff is not disabled if the ALJ applied the
7 proper legal standard and there is substantial evidence in the record as a whole to support the decision.
8 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence
9 as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S.
10 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less
11 than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.
12 Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than one rational
13 interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th
14 Cir. 1984).

15 ***A. THE ALJ FAILED TO PROPERLY CONSIDERED THE MEDICAL EVIDENCE***

16 The ALJ is entitled to resolve conflicts in the medical evidence. Sprague v. Bowen, 812 F.2d
17 1226, 1230 (9th Cir. 1987). He may not, however, substitute his own opinion for that of qualified medical
18 experts. Walden v. Schweiker, 672 F.2d 835, 839 (11th Cir. 1982). If a treating doctor's opinion is
19 contradicted by another doctor, the Commissioner may not reject this opinion without providing "specific
20 and legitimate reasons" supported by substantial evidence in the record for doing so. Murray v. Heckler,
21 722 F.2d 499, 502 (9th Cir. 1983). "The opinion of a nonexamining physician cannot by itself constitute
22 substantial evidence that justifies the rejection of the opinion of either an examining physician or a
23 treating physician." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1996). In Magallanes v. Bowen, 881
24 F.2d 747, 751-55 (9th Cir. 1989), the Ninth Circuit upheld the ALJ's rejection of a treating physician's
25 opinion because the ALJ relied not only on a nonexamining physician's testimony, but in addition, the
26 ALJ relied on laboratory test results, contrary reports from examining physicians and on testimony from
27 the claimant that conflicted with the treating physician's opinion.

28 Here, on July 16, 2004, Mrs. Lunderville had a C2 through T1 laminectomy at Harborview

1 Medical Center (Tr. 159). A pathology report after surgery confirmed that she had an “ependymoma,
2 WHO grade 2” (Tr. 159). After the surgery, Mrs. Lunderville developed significant postoperative
3 neurological changes with upper greater than lower extremity weakness, sensory changes and bowel and
4 bladder dysfunction (Tr. 159). Mrs. Lunderville moved to the rehabilitation unit of Harborview on July
5 22, 2004, where she stayed until September 3, 2004 (Tr. 140). The discharge summary indicated that on
6 discharge she was continuing to have problems with upper extremity strength and with impaired
7 mobility and balance (Tr. 140-41).

8 On March 18, 2005, Mrs. Lunderville started treatment with Jerry Sullivan, M.D. at Group Health.
9 He gave her permission to return to work starting March 28, 2005, but indicated that she could not
10 perform lifting or pushing over 25 pounds, could not do prolonged standing and walking (Tr. 219-20). In
11 July 2005, Dr. Sullivan wrote:

12 I have sent information to the insurance company who does her disability and they
13 requested more information. I sent information saying that she could go back to light duty
14 working 4 hours, walking for an hour at a time, standing for an hour at a time, with breaks
15 in between, as she still has some difficulty with her gait, although she can walk, does not
16 fall. She has some fine motor control problems on her right hand where she has very little
sensation. Patient says she can use a keyboard. I am referring the patient now to physical
medicine specialists at Group Health for evaluation. I am referring the patient to our
physical therapy here for a functional evaluation to see how she is responding to help me
fill out these forms that the insurance company is asking.

17 (Tr. 218). On Dr. Sullivan’s referral, Dr. Beck evaluated Plaintiff on September 1, 2005. Dr. Beck
18 confirmed Dr. Sullivan’s opinion, stating, “She has limited standing and walking due to fatigue and her
19 neurological deficits. Impaired fine motor coordination in her hands will impact her abilities” (Tr. 214).
20 The Physical Therapist’s notes reflect the same (Tr. 210).

21 The ALJ reviewed the medical evidence of record, and as noted above, he concluded Plaintiff was
22 not disabled based on the finding that she is restricted from doing constant keyboarding. This restriction,
23 however, does not accurately reflect the medical records of Dr. Sullivan or Dr. Beck. After reviewing the
24 matter, the undersigned finds the ALJ’s decision is not supported by substantial evidence and the ALJ did
25 not adequately explain why he discounted Dr. Sullivan’s, Dr. Beck’s and the Physical Therapist’s
26 assessment of greater restrictions with Plaintiff’s fine motor skills.

27 The ALJ summarized Dr. Sullivan’s findings, but he did not consider how Dr. Sullivan’s
28 assessment of Plaintiff’s fine motor skills and how this impairment and related fatigue and neurological

1 deficits impacted her ability to perform the full range of sedentary work. At the time, Mrs. Lunderville
2 reported she could not tell temperature because of lack of feeling in her hands, had no fine motor skills
3 and could not write (Tr. 85, 88, 89). She was not able to button buttons (Tr. 85). The limitations
4 discussed by Dr. Sullivan, Dr. Beck, the Physical Therapist and those alleged by Plaintiff suggest greater
5 restrictions than those assigned by the ALJ, i.e., a restriction from constant keyboarding and fatigue.
6 Significantly, the ALJ does not address those greater restrictions, and thus, he failed to provide any
7 legitimate reason to discount those medical opinions that supported greater restrictions.

8 The ALJ's error in addressing the medical opinion of Dr. Sullivan carried over to the hypothetical
9 that was posed to the vocational expert. The hypothetical posed at the hearing by the ALJ was based on
10 an erroneous review of the medical evidence. Since it is not clear that a hypothetical was posed that
11 properly addressed Mrs. Lunderville's limitations, a remand for further consideration and testimony is
12 required.

13 CONCLUSION

14 Based on the foregoing discussion, the Court should remand the matter to the Administration for
15 further consideration. On remand the Administration should consider the limitations in the use of
16 Plaintiff's hands during the period from July 14, 2004 to February 13, 2007, and it should consider Dr.
17 Sullivan's opinion that she was limited to part time work.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
19 parties shall have ten (10) days from service of this Report to file written objections. *See also*
20 Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of
21 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
22 clerk is directed to set the matter for consideration on **January 23, 2009**, as noted in the caption.

23 DATED this 5th day of January, 2008.

24
25 /s/ J. Kelley Arnold
26 J. Kelley Arnold
27 U.S. Magistrate Judge
28